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Staying Current on Insurance Issues Confronting Nonprofit Organizations

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Lorman Education Services

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The Lead

I. Why Does a Nonprofit Need Insurance? Why Does It Need to Understand That Coverage?

II. What Types of Insurance Policies Should a Nonprofit Consider?

III. Who Should Be Insured? Who Should Be Involved in That Determination?

IV. To Where Should That Coverage Extend?

V. When Should a Nonprofit Organization Consider Insurance Coverage Issues?

VI. How Can a Nonprofit Organization Protect Its Interests?

VII. Conclusion/Question-and-Answer Session

Why Does a Nonprofit Need Insurance?

<u>Obvious Answer:</u> **To protect against risks.**

- First line of defense
  - → Reasonably expected risks associated with “third parties” (generally, losses by someone other than the “insured”)
  - → Reasonably expected risks associated with “first parties” (generally, losses by the “insured”)
- Last line of defense
  - → Tiers of insurance
  - → Umbrella policies

Why Does a Nonprofit Need Insurance?

***Not-so-Obvious Answers*:**

There may be legal obligations.

- Automobile Liability
- Workers' Compensation
- Contractual Obligations

Why Does a Nonprofit Need Insurance?

It makes business sense to have comprehensive coverage.

- Protects your organization against catastrophic loss
- Protects your organization against unforeseeable loss
- Protects your people
- Attracts and keeps qualified board members, directors, and officers

Litigation follows success.

Why Does It Need to Understand That Coverage?

- **One size does not fit all.**
  - → "CGLs"
  - → "Blanket" Policies
  - → "All Risk" Policies
  - → "Nonprofit Organization" Policies
- **Policies should be relatively, but realistically, custom-fitted.**

Why Does It Need to Understand That Coverage?

- **Spending more does not equal better coverage.**

- **Insurance is part of an ongoing, self-evaluative process.** A nonprofit that does not understand its policies cannot protect against its risks.

What Types of Insurance Policies Should a Nonprofit Consider?

- Automobile
- Commercial General Liability
- Directors & Officers
- Errors & Omissions
- ERISA/Fiduciary

What Types of Insurance Policies Should a Nonprofit Consider?

- Employee Dishonesty/Fiduciary
- Property Damage
- Umbrella
- Workers' Compensation
- Specialty Policies

Who Should Be Insured?
Who Should Be Involved in That Determination?

You should be the insured.

- Use the legal name for your nonprofit organization.
  - → If you use a trade name, a street name, or some other identifier, your applications and your policies also should reflect that name.
  - → If your nonprofit organization changes its name, be sure that your applications and your policies reflect that change.

Who Should Be Insured? Who Should Be Involved in That Determination?

- **Do not assume that your insurers know who "you" are.**
  - → Subsidiary organizations
  - → Parent organizations
  - → Affiliated organizations
  - → Committees
  - → Branches

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Who Should Be Insured? Who Should Be Involved in That Determination?

- **Do not assume that your insurers know who your “directors and officers” are.**

  → Boards of directors

  → Boards of trustees

  → Shareholders

  → Managers

  → Officers

  → Spouses

Who Should Be Insured?
Who Should Be Involved in That Determination?

- **Do not assume that your insurers know what your "directors and officers" expect.**

  → Right to retain (and duty to pay) counsel

  → Conflicts of interest

  → Personal indemnification

Who Should Be Insured?
Who Should Be Involved in That Determination?

- **Do not assume that your insurers know who your “people” are.**

  → Employees

  → Volunteers

  → Interns

  → Contractors

Who (Else) Should Be Insured? Who Should Be Involved in That Determination?

Additional Insureds

- Subsidiary, Parent, and Affiliated Organizations
- Independent Contractors
- Co-Venturers
- Government Agencies
- Venues and Related Entities
- Other Drivers (Automobile Policies)

<u>Who</u> Should Be Insured?
<u>Who</u> Should Be Involved in That Determination?

<u>You</u> need to be involved in that determination.

Who Should Be Insured? Who Should Be Involved in That Determination?

Your qualified insurance broker needs to be involved in that determination.

- Understanding your organization
- Understanding your goals
- Understanding your business
- Frankly assessing your potential risks

Who Should Be Insured?
Who Should Be Involved in That Determination?

Your qualified insurance broker needs to be involved in that determination.

- Frankly assessing your potential liabilities
- Helping you address potential liabilities, to the extent possible
- Helping you achieve an optimal level of coverage

Who Should Be Insured? Who Should Be Involved in That Determination?

- **Your insurance carriers should be involved in that determination.**
- **Coverage counsel also may help address your concerns about various issues.**
  - → Scope of the coverage provided
  - → Who may be an insured
  - → What potential liabilities may be excluded

To Where Should That Coverage Extend?

- Where have your activities been?
- Where are your activities now?
- Where will your activities be during the policy period? The foreseeable future?

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<u>When</u> Should a Nonprofit Organization Consider Insurance Coverage Issues?

Baseline assessment

- What are your risks? How do you intend to account for them if "disaster strikes?"
- What are your needs? What role, if any, does insurance play?
- Who are your people and what do they do? What coverage, if any, is provided for their activities?
- What are your goals?

<u>Warning</u>: Don't stop there!

When Should a Nonprofit Organization Consider Insurance Coverage Issues?

Reassessments

- Ongoing, continuous, thoughtful self-evaluations
- Reconsidering risks as activities (and potential liabilities) expand
- Learning from your own claim history

<u>When</u> Should a Nonprofit Organization Consider Insurance Coverage Issues?

Reassessments

- Monitoring competitors and claims filed against them
- Monitoring potential plaintiffs, potential claimants, and their counsel
- Monitoring significant legal developments that affect the kinds and amount of potential liability

When Should a Nonprofit Organization Consider Insurance Coverage Issues?

Renewals

- You must keep track of your "policy periods."
- It is reasonable to expect insurance agent to monitor the end of a policy period, but this is not a delegable responsibility.
- Calendar expirations of insurance policies just like any other deadlines.
- Be sure to include sufficient time to reassess your risks, needs, people, and goals.

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When Should a Nonprofit Organization Consider Insurance Coverage Issues?

- **Closely monitor your “renewed” policies and consider how they change or impact.**

  → Coverage

  → Insureds

  → Endorsements

  → Exclusions

  → Conditions

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How Can a Nonprofit Organization Protect Its Interests?

You should consider insurance to be part of a risk management program, not the risk management program.

How Can a Nonprofit Organization Protect Its Interests?

Step 1: Identify and address risks that you can eliminate.

- Unprofitable activities that do not warrant investment of insurance
- Unprofitable activities that cannot be insured
- Unprofitable activities that cannot be *reasonably* insured

How Can a Nonprofit Organization Protect Its Interests?

Step 2: Identify risks that you can limit.

- Establish and enforce clear employee guidelines.
  - → Can reduce litigation and your premiums.
  - → Help account for potential risks and liabilities as part of your assessments.

How Can a Nonprofit Organization Protect Its Interests?

Raise awareness about potential liabilities.

- Defensive driving classes for employees who operate organization vehicles
- Harassment training
- Lunch-and-learns

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How Can a Nonprofit Organization Protect Its Interests?

Step 3: Identify the risks that you can and want to insure.

- Assess (and reassess) what an organization considers important.
  - → Past
  - → Present
  - → Future

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How Can a Nonprofit Organization Protect Its Interests?

Assess (and reassess) what risks your organization faces and potential liabilities associated with those risks.

- Organization’s risk history
- Competitors’ risk history
- Legislative environment
- Regulatory environment
- Legal environment
- Risks posed by advocacy groups

How Can a Nonprofit Organization Protect Its Interests?

Assess (and reassess) changes to the policies.

- Understand them.
  - → Match your coverage with your risks.
  - → Match your coverage with your insureds.
  - → Ensure the coverage provided meets your realized risks and potential liabilities.
  - → Ensure the coverage provided extends to the right people.
- Keep them.

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How Can a Nonprofit Organization Protect Its Interests?

Common Exclusions

- Exclusions explicitly preclude insurance coverage for losses arising from certain conduct, activities or circumstances.
  - → "We will defend against and indemnify you against certain kinds of losses, but . . .."
  - → They vary, somewhat, from policy to policy and insurer to insurer.
  - → The effect that any given exclusion will have on your organization depends on, among other things, the risks that your organization faces.

How Can a Nonprofit Organization Protect Its Interests?

Safe Harbors

- Sometimes insurers provide a respite from broad exclusions—sometimes without, sometimes with an additional premium.

- Safe harbors can mean the difference between no coverage for certain risks and conditional coverage for certain risks.

How Can a Nonprofit Organization Protect Its Interests?

Safe Harbors

Dishonesty exclusion

Example: "This policy excludes coverage for loss arising from an insured's dishonest, fraudulent or criminal acts or omissions. If a claim would invoke the insurer's duty to defend but for the allegations, then the insurer will defend the claim until there is a final adjudication by a factfinder, or admission by the insured…"

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How Can a Nonprofit Organization Protect Its Interests?

Safe Harbors

Intentional acts exclusion

Example: "This policy excludes coverage for loss arising from acts expected or intended to cause property damage or bodily harm, except that this exclusion does not pertain to any Wrongful Acts as defined by this policy."

How Can a Nonprofit Organization Protect Its Interests?

Conditions

- Even if a “covered event” occurs and even if no exclusions apply, the insurer’s assistance can be lost.
  - → Also vary, somewhat, from policy to policy and insurer to insurer
  - → Duty to report potentially covered event promptly and/or within a certain number of days
  - → Duty to cooperate with the insurance company

Conclusion

- Final Thoughts:

  → Know your type of policies.

  → Know *your* policies.

  → Evaluate your risks and coverages on an ongoing, *continuous* basis.

- Questions?

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